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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 578

EFFIE EMERSON WALSH, *Petitioner*,

v.

BERNARD A. WALSH.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

The petitioner, Effie Emerson Walsh, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana, reversing the judgment of the Twenty-Sixth Judicial District Court in and for Bossier Parish, Louisiana, vacating and setting aside the judgment of divorce previously granted Bernard A. Walsh.

OPINION BELOW.

The opinion of the Supreme Court of Louisiana (R-1.[1] 196-203) is reported at La. , 42 So. 2d 860. The

[1] The record filed in this Court is in two volumes, each separately numbered. References to the first volume will be indicated by "R-1." and to the second by "R-2."

opinion of the trial court (Twenty Sixth Judicial Court in and for Bossier Parish, Louisiana) is not reported but appears at R-1. 176-179.

JURISDICTION.

The judgment of the Supreme Court of Louisiana was entered June 30, 1949 (R-1. 196), and a timely petition for rehearing (R-1. 204-207) was denied November 7, 1949 (R-1. 208). The jurisdiction of this Court is invoked under Section 1257 (3) of the Judicial Code (28 U. S. C. 1257 (3)).

QUESTIONS PRESENTED.

1. Whether the institution of divorce proceedings by the husband without actual notice to the non-resident defendant (the petitioner) and under a statute not requiring any form of notice in such cases—not even by mailing, publication or some similar device—violated petitioner's rights under the due process clause of the 14th amendment to the federal constitution.

2. Whether in proceedings brought by petitioner to vacate a default judgment of divorce secured under such circumstances, she was denied due process by imposing upon her the burden of showing that the divorce court had originally lacked jurisdiction because of the husband's non-residence.

3. Whether the husband was a resident of Louisiana and, therefore, whether the Louisiana court had jurisdiction to entertain his petition for divorce.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Section 1 of the 14th Amendment to the Constitution of the United States in pertinent part provides:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law. . ."

The statutes of Louisiana in pertinent part provide:

> "In any action for separation from bed and board or divorce, where the defendant is absent from the state, or in case of reconvention, when the plaintiff is absent from the state; and in actions for divorce based on a judgment of separation from bed and board, when the adverse party is absent from the state, the court having jurisdiction over the cause shall, upon the application by any party in interest, appoint a curator ad hoc to represent such absent party, and all proceedings shall be had contradictorily with said curator ad hoc, and any judgment or divorce may be rendered against same curator ad hoc as might be rendered against his principal as if he were present in person in open court".

[Acts 1910, No. 296, § 1, as set out in Dart's La. Gen. Stats. (1939, Annotated), Vol. 2, Ch. 4, *Divorce*, § 2208.][2]

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[2] Subsequent to the entry of the judgment of divorce in the instant case, the Louisiana statute was amended, on July 10, 1944, to read as follows:

> "In any action for separation from bed and board or divorce where the defendant is either absent from the state, or his whereabouts are unknown, the court having jurisdiction over the cause shall, upon application by the plaintiff, appoint a curator ad hoc who shall be an attorney at law, to represent the absent party and all proceedings shall be had contradictorily with the said curator ad hoc, and judgment or divorce may be rendered against his principal as if the principal were present in open court, provided that upon the trial of the cause upon the merits or upon confirmation of any preliminary default therein, due proof shall be made of a diligent effort on the part of the plaintiff to locate the said absentee, and provided further, that this act shall be made retroactive and fully effective as to suits presently pending".

[Act No. 192, § 2, Acts State of Louisiana Reg. Sess. 1944, pp. 567-568.]

While the question is not, of course, posed in this case, the amended act may, for reasons which appear in the Argument, be of doubtful validity.

STATEMENT.

Bernard A. Walsh and Effie Emerson, the petitioner, were married at Annapolis, Maryland on December 19, 1927 (R-1. 123-124; R-2. 47-48). He was then in the Army (R-2. 47; R-1. 98-102) and she was employed by the Government in Washington, D. C. (R-2. 44). Following their marriage they lived together in Washington, D. C. where he was stationed (R-2. 31. See also his military record at R-1. 98-102). In January, 1932, he was transferred out of the Washington area and thereafter moved from post to post (R-1. 98-102). Because of these continual transfers and financial limitations, Bernard and Effie mutually agreed that she would continue to work and reside in Washington (R-2. 44-45). However, in the years after 1932 they lived together as man and wife on various occasions when they could arrange to get together,[3] and during the intervals Bernard wrote her frequently in letters professing his love for her.[4]

On February 25, 1944, while stationed in New Mexico, (R-1. 101-102), Bernard suddenly filed a divorce suit against petitioner in the Twenty Sixth Judicial Court in and for Bossier Parish, Louisiana, alleging that they had separated December 29, 1931, and had lived separate and apart after that date, and that he moved to Bossier Parish November 1, 1932, with the intention of making his home there (R-1. 17-18). In accordance with provisions of the Louisiana statutes (*supra* p. 3) and the prayers of the petition, a so-called curator ad hoc was appointed by the court to represent the absent defendant, the petitioner here (R-1. 19).

The record contains a copy of a letter dated February 28, 1944 (R-1. 20), which purports to be a letter of advice from the curator to petitioner as to the institution of this

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[3] See, e.g., R-2. 2-4, 7-9, 15, 19-21, 22, 32, 33-34, 35, 36-38, 70-71.

[4] See, e.g., R-1. 107, 108, 110, 112, 113.

divorce action, but petitioner denied having received such a letter (R-2. 43) and there is no evidence that she did receive the letter. Moreover, there is no conclusive evidence either as to its mailing or as to its contents and enclosures, if any.[5] There is no evidence of any other efforts to give notice to petitioner of the pendency of the divorce suit, and she denied knowing that a divorce had been granted until after Bernard's death on September 22, 1944 (R-2. 43, 53-54).[6]

On March 27, 1944, Bernard secured a default judgment of divorce (R-1. 22). A few days later he went through a marriage ceremony with one Roovie House whom he had met in 1934 (R-2. 96-97). After Bernard's death in September, 1944 (R-1. 95), Effie first learned of the divorce and that Roovie claimed to be his widow (R-2. 43, 53-54). Effie promptly petitioned the Bossier Parish court to vacate and set aside the divorce decree it had earlier entered, alleging, *inter alia,* that she had not received notice of the divorce proceedings, that the court had been without jurisdiction to entertain the divorce suit, and that the allegations of the petition for divorce regarding separation were false (R-1. 24-28, 40-45, 50-51, 65-67).

At the trial of these issues, in addition to the facts already stated, the following evidence was adduced on the question of Bernard's residence. It was shown that he could not personally have testified in the divorce proceeding to establish the allegations of his petition, including that with respect to residence, because at that time he was

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[5] The curator, testifying below, was very uncertain as to details with respect to this letter. See R-2. 105-107. He stated that the letter was prepared by the plaintiff's counsel, and thought he had mailed it because that was his practice in such cases. He did not send it by registered mail and could not recall whether he had enclosed a copy of the divorce petition. The copy of the letter adduced below had not even been retained in the curator's files.

[6] The record shows that the curator ad hoc, after accepting service, waived citation (R-1. 19).

on duty between Oklahoma and New Mexico (R-1. 96, 102).[7] The only evidence to show Bernard's residence in Louisiana prior to his petition for divorce was: (1) the inconclusive testimony of some family and friends such as that he called Barksdale Field his home (see R-2. 81-82, 90-91, 91-92, 94-95, 97-99, 108-109); (2) proof that he maintained a bank account and safety deposit box in Bossier City (R-2. 81-82); (3) proof of his purchase, financing and registration of an automobile in Louisiana (R-1. 163-169, 171-172, 173-174); and (4) the fact that he had been stationed at Barksdale Field from October 14, 1932 to May 21, 1933, from May 21, 1934 to July 26, 1937 and from September 28, 1939 to November 1, 1941 (R-1. 95), all of which long preceded his divorce petition. On the other hand, his whole history and recorded statements as to his residence reflect that he was a California domiciliary. He was born and reared in California where his family still resides (R-1. 128-132, 137-140, 86), and in 1917 entered the Army at Fort McDowell, California (R-1. 98), Napa, California then being his domicile (R-1. 129, 138). Except for a short period after World War I, he continued as a professional soldier until his death (See R-1. 98-102). Apparently at no time during his Army career did he acquire any private dwelling of his own and during his entire duty in Louisiana he lived in barracks at Barksdale Field (R-2. 13, 18-19, 69, 104). Moreover, as with his duty at other posts, both before and after, his assignment to Barksdale Field was not by free choice but by orders of his military superiors (R-1. 98-102). More than 17 months after he had been transferred from Louisiana—to which he never returned for duty—and less than a year before petitioning for divorce, Bernard, when applying for National Service Life Insurance, gave his

[7] As a matter of fact had he been present to testify in the divorce case, his counsel, who was also counsel for Roovie in the revocation proceeding, could and would have verified his presence by so testifying in the revocation hearings.

residence as California (R-1. 86) and designated as his beneficiary the petitioner whom he listed as his "wife".

On these facts, the Bossier Parish Court vacated the earlier divorce decree (R-1. 183) on the grounds: (1) that it had lacked jurisdiction of the divorce suit in that Bernard was not a Louisiana domiciliary; and (2) that the allegation in the divorce petition as to the parties having lived separate and apart from 1931 was untrue (R-1. 176-179). On appeal by Roovie to the Supreme Court of Louisiana, that judgment was reversed on the ground that petitioner in seeking to vacate a presumptively valid divorce decree had the burden to prove lack of jurisdiction and that petitioner had not carried this burden (R-1. 196-203). A timely petition for rehearing (R-1. 204-207) raising, *inter alia*, questions as to due process in relation to the jurisdiction of the divorce court (Point 7, R-1. 206-207) was refused without opinion (R-1. 208).

REASONS FOR GRANTING THE WRIT.

Effie Emerson Walsh seeks this Court's protection of marital rights which her roving husband sought to destroy by "ex parte"[8] divorce proceedings shrouded in a secrecy sanctioned by the law of Louisiana. Unknown to Effie, who remained in her long-time residence in Washington, D. C., her husband, Bernard A. Walsh, applied for and secured a default judgment of divorce in Louisiana under a statute which made no provision whatsoever for any form of notice reasonably calculated to advise Effie of Bernard's attempt to sever their marriage. When Effie learned of this divorce judgment and petitioned, successfully, to have it vacated by the court which had entered it, the Supreme Court of Louisiana advised Effie that the judgment, thus surreptitiously obtained by Bernard, was clothed with a presumptive sanctity and that, therefore, the burden fell upon her to dis-

[8] So characterized in *Sherrer* v. *Sherrer*, 334 U. S. 343, 349 note 11, and 356 (1948).

prove the existence of the jurisdictional facts prerequisite to the validity of the divorce judgment. This case presents to this Court, for the first time, the question whether an ex parte divorce secured on a type of constructive service of process not reasonably calculated to give actual notice and an opportunity to be heard is valid under the due process clause of the Fourteenth Amendment to the United States Constitution.

Of whatever persuasion the members of this Court may have been on the now settled question as to whether a divorce secured against a non-resident on constructive service of process is constitutionally acceptable, particularly within the orbit of the full faith and credit clause, all have emphasized, time and again, the necessity for the observance of due process in the divorce proceedings to validate them either domestically or in any other state of the Union. The acceptance of the ex parte divorce has been bottomed on this Court's determination that:

> "There is no constitutional barrier *if* the form and nature of the substituted service . . . meet the requirements of due process".[9]

And many decisions of this Court have demonstrated that the minimal form and nature of the substituted service required to comport with the traditional notions of fair play and substantial justice inherent in the due process concept is that "reasonably calculated to give [the absentee defendant] actual notice of the proceedings and an opportunity to be heard".[10]

By these constitutional standards, the procedure adopted by the law of Louisiana and utilized by Bernard to divorce Effie is plainly beyond the pale. Under the applicable Louisiana statute, no provision was made for personal ser-

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[9] *Williams* v. *North Carolina*, 317 U. S. 287, 299 (1942). Emphasis supplied.

[10] *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940), cited approvingly in the first *Williams* case, supra, fn. 9.

vice of process upon the absentee defendant wherever she may have resided or been found, nor for registered or other mailing of notice to the absentee, nor even for publication or some other substitute device for publicizing the fact that divorce proceedings had been instituted. The statute merely prescribed for the appointment of a so-called curator ad hoc against whom "all proceedings shall be had contradictorily" and whose duties have, by decisions of the Supreme Court of Louisiana, been limited exclusively to accepting service of process and putting the plaintiff to proof of the allegations of the divorce petition.

Thus, under the Louisiana procedure involved here a divorce could be and in fact was secured without any prescribed attempt whatsoever to give the absentee defendant any actual notice and an opportunity to be heard. That judgment of divorce, petitioner submits, cannot stand, for the procedure by which it was effected exalts form over the substance of the due process requirement with respect to notice and process. Indeed, a parallel statutory device for substituted service in non-resident motorist cases and a judgment obtained thereunder were stricken down by this Court (even though there was evidence of actual notice having been given) because there was no duty imposed by the statute upon the official designated to receive service of process nor upon the plaintiff or any other person to attempt to communicate notice to the absentee defendant. *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928).

There is no decision of this Court which would sustain the validity of a judgment obtained under such a sham substituted service procedure as that here involved. Yet not only to prevent petitioner from having been statutorily deprived of her opportunity to be heard, but also to dispel any apprehensions as to whether there are constitutional limits on the concept of the ex parte divorce, this Court's intervention is necessary. Whether or not the concept of the ex parte divorce validated in the *Williams* cases can

fairly be characterized as "perverse and unrealistic",[11] its toleration under the circumstances here would lead to a "jurisprudence of conceptions" applied with relentless disregard of consequences. "The impelling reasons which have justified this variant still leave it important to keep it within tolerable bounds."[12] This case furnishes the opportunity to which Mr. Justice Cardozo might well have addressed his words that:

> "If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers to do the noisome work."[13]

It is for these reasons that petitioner asks this Court to review her case and declare the Louisiana procedure by which Bernard A. Walsh secured a divorce one so barren in form as not to comport with the fundamentals of justice and fair dealing embodied in the overall requirement of due process.

ARGUMENT.

We are not challenging the constitutional propriety of divorce proceedings effected by substituted service of process upon a non-resident defendant. The question here is whether the form and nature of the particular substituted service utilized comports with the due process standards established by this Court.

As more fully reflected in the Statement, *supra*, pp. 4-5, Bernard A. Walsh secured a divorce from petitioner, a resident of Washington, D. C., by complying with the substituted service provisions of the Louisiana code. There was no personal service of process in or out of Louisiana,

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[11] Justice Jackson dissenting in *Rice* v. *Rice*, 93 L. ed 770, 773 (1949).

[12] Powell, *And Repent At Leisure*, 58 Harv. L. Rev. 930, 940 (1945).

[13] In *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 480 (1928).

no publication, nor any evidence that petitioner had actual notice. Service was effected solely under the apparently unique Louisiana statutory mechanisms for substituted service, *supra,* p. 3, which provided in substance merely for the appointment of a so-called curator ad hoc to "represent such absent party". The only statutory specification of the curator's functions—if it be specification—is the direction that

> "all proceedings shall be had contradictorily with said curator ad hoc, and any judgment or divorce may be rendered against [him] as might be rendered against his principal as if he were present in person in open court".

In 1919—on the supposed authority of *Pennoyer* v. *Neff,* 95 U. S. 714 (1878); *Bell* v. *Bell,* 181 U. S. 175 (1901); and *Haddock* v. *Haddock,* 201 U. S. 562 (1906)—the Supreme Court of Louisiana decided that the foregoing statute did not offend the due process clause of the federal constitution, *supra,* p. 2, but without any discussion as to whether the form and nature of the substituted service thus provided was acceptable within the standards laid down by this Court. *Lepenser* v. *Griffin,* 146 La. 584, 83 So. 839 (1919). Presumably, the failure below to treat with petitioner's contentions that she received no notice of the divorce proceedings and that the procedure adopted denied her due process of law can be traced to the fact of Louisiana's previous disposition of the constitutional problem in the *Lepenser* case.

Subsequent to the latter decision, the Supreme Court of Louisiana had occasion, in *Johnson* v. *Jones,* 170 La. 760, 129 So. 155 (1930), to consider the functions and duties of the curator appointed to represent the absentee divorce defendant. The state court there held that the curator's only duties were those conferred by the statute and, in effect, that his only function was to accept service of proc-

ess and put the plaintiff on his proof of the allegations of the petitioner for divorce.[14]

Petitioner's claim here is that the form and nature of the foregoing substituted service procedure as applied in Louisiana practice is constitutionally proscribed as evidenced by this Court's historical application of the due process clause of the 14th Amendment.

In the first *Williams* case,[15] by which "the jurisdictional requirement of domicile [was] freed from confusing refinements about 'matrimonial domicile' ",[16] this Court carefully qualified its reversal of *Haddock* v. *Haddock, supra,* so as to preclude an unbridled ex parte divorce practice, by noting that:

> "There is no constitutional barrier if the form and nature of the substituted service (see Milliken v. Meyer, supra (311 US p. 463, 85 L. ed. 283, 61 S. Ct. 339, 132 ALR 1357)) meet the requirements of due process. Atherton v. Atherton, supra, (181 US p. 172, 45 L ed. 803, 21 S Ct 544)."

And in his concurring opinion Justice Frankfurter pointed out that where the divorce proceedings failed "to meet the tests of justice and fair dealing that are embodied in the historic phrase, 'due process of law' ", the judgment so rendered would be null and void in the granting state as well as all the other states of the Union. 317 U. S. at 306.[17] See also dissent of Justice Jackson 317 U. S. at 316-320.

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[14] The court stated in part that:

> "The curator ad hoc is not the attorney of the defendant. He has no mission nor authority derived from her. He represents her only by virtue of his appointment by the judge of the district court under the authority conferred upon him by law. . . His compensation is due him as curator ad hoc, and not as counsel, of the absent defendant". 170 La. at 762.

[15] *Williams* v. *North Carolina,* 317 U. S. 287 (1942).

[16] *Williams* v. *North Carolina,* 325 U. S. 226, 229 (1945).

[17] *Accord: Baker* v. *Baker, E. & Co.,* 242 U. S. 394, 403 (1917).

In *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940)—cited approvingly in *Williams* I with reference to the appropriate standards for substituted service—this Court noted that the "adequacy" of substituted service:

> ". . . so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give (the defendant) actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice (McDonald v. Mahee, 243 U. S. 90, 61 L ed 608, 37 S Ct. 343, LRA 1917 F 458 supra) implicit in due process are satisfied."

Mr. Justice Holmes, who delivered the opinion in *McDonald* v. *Mahee*, cited in the *Milliken* case, cautioned that:

> "The foundation of jurisdiction is physical power . . . No doubt there may be some extensions of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind . . . And in states bound together by a constitution and subject to the 14th amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." 243 U. S. at 91.

Justice Holmes then went on to say that:

> "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." 243 U. S. at 92.[18]

In the instant case, it is apparent that the form and nature of the substituted service provided by the Louisiana

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[18] "The efficacy [as due process] of an attempt to provide constructive service . . . would rest upon the presumption that the notice would be given in a manner calculated to reach the witness. . ." Chief Justice Hughes in *Blackmer* v. *United States*, 284 U. S. 421, 439 (1931).

statute was not such as could "meet the tests of justice and fair dealing." Historically, under the common law system, the use of process was intended to assure the defendant of notice and an opportunity to defend. See Dean Gavit's notes on *Blackstone's Commentaries,* Ch. XVIII. This assurance is now a fundamental requisite of due process. See, e.g., *Pennoyer* v. *Neff,* 95 U. S. 714, 733-734 (1878); *Riverside & D. R. Cotton Mills* v. *Menefee,* 237 U. S. 189, 193-194 (1915); *Baker* v. *Baker, E. & Co.,* 242 U. S. 394, 403 (1917) and cases cited. While departures from the common law requirement of personal service have been permitted under modern procedure because "constructive service is at times a necessary recourse",[19] nevertheless, to be legitimized these offspring must be able to trace their lineage to the *ratio decidendi* of the original requirements for service of process.[20] They must, as Justice Holmes stated, adhere in principle to the foundations of jurisdiction by requiring that which is most likely to give actual notice and an opportunity to be heard.

The Louisiana procedure, however, is *least* likely to give notice to the absentee defendant, for the so-called curator is shorne of any real duty and neither he nor any one else has any duty to take any steps to effect notice. Whatever tolerance is to be accorded legislative discretion in selecting substituted service devices, the limits of tolerance cannot encompass such a sham advanced as a fair substitute for the historical requirement of process. The constitutionality of a substituted service provision may require something less than perfection in the devices selected, but certainly does not permit of standards far less effective and

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[19] *Ballard* v. *Hunter,* 204 U. S. 241, 254 (1907).

[20] This Court has repeatedly noted that substituted service provisions are in derogation of the common law and that, therefore, to establish jurisdiction within them there must be exact and literal compliance with the statute. See, e.g., *Galpin* v. *Page,* 18 Wall. (85 U. S.) 350, 369 (1873).

assuring than those which experience has demonstrated are attainable.[21]

Search as one may, with one questionable exception,[22] there is not a single decision of this Court justifying such a drastic departure from historical concepts basic to service of process. In the divorce field, the farthest this Court has gone is to approve substituted service based upon publication together with mailing to the last known address of the absentee defendant. *Atherton* v. *Atherton*, 181 U. S. 155 (1901). Even if the Court would still approve such substituted service[23]—which is of questionable

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[21] In some states, for example, statutes require personal service upon the non-resident where possible. See Colorado Stats. Anno. (1935) C. 56, §§ 4 and 5. See also discussion 25 N. C. L. Rev. 192 (1947). Most states require at least that there be publication and *registered* mailing to the last known address of the absentee.
The Restatement on *Conflict of Laws*, § 109 states:

> "A state cannot exercise through its courts judicial jurisdiction over the status of a person, unless a method of notification is employed which is *reasonably calculated* to give him knowledge of the attempted exercise of jurisdiction and an opportunity to be heard". (Italics supplied)

[22] In *Maynard* v. *Hill*, 125 U. S. 190 (1888), this Court sustained a dissolution of marriage effected by direct legislative enactment without notice or hearing of any kind. But the Court was there concerned with the constitutional separation of powers question, not due process. Moreover, that decision may have been overruled *sub silento* by more recent decisions of this Court. See dissent of Justice Black in *Williams II*, 325 U. S. at 273-274.

[23] Both the majority and minority decisions in *Atherton* expressly turned on the question whether the matrimonial domicile was located in the state where the divorce was rendered on substituted service. If the parties had lived as man and wife in the rendering state there is some justification for its acting on a limited constructive service procedure to protect its domiciliary from the other party who absents himself from that state. Moreover, in such circumstances, there is some chance that the absentee, through associations formed in the state of the matrimonial domicile, will receive actual notice. See Strahorn and Reiblich, *The Haddock Case Overruled—The Future of Interstate Divorce*, 7 Md. L. Rev. 29, p. 44 *et seq.* (1942). The overruling of the *Haddcok* case,

utility[24]—such approval would not justify a procedure which does not incorporate even the minimum safeguards of publication and mailing.

In other areas of law, no precedent can be found for the indifference exhibited here as to whether the absentee is made aware of the pendency of litigation affecting his interests. ". . . it does not aid in the solution of the problem presented by this case to label these proceedings as proceedings in rem".[25] In virtue of the jurisdiction of each state over property within its borders, it is obliged to inquire into claims against such property even as against absentee interests. Moreover, since the law assumes property is always in the possession of its owner, notice will be assured by reason of seizure. *Pennoyer* v. *Neff*, 95 U. S. 714, 723, 727 (1878); *Arndt* v. *Griggs*, 134 U. S. 316 (1890); *Ballard* v. *Hunter*, 204 U. S. 241, 254-255 (1907). This reasoning is patently not apposite to divorce actions against non-residents. Even in those few instances where statutes authorizing in rem proceedings without the minimum safeguards of publication, mailing or other like notice were tolerated by this Court, there were other assurances—not present here—for the protection of the absentee.[26]

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eliminates these possible arguments to justify constructive service by publication.

The *Williams* cases cannot be read as approving the device of publication because, as the Court expressly noted, no question of due process was raised there (315 U. S. at 299), even assuming it could have been. See Powell, *And Repent At Leisure*, 58 Harv. L. Rev. 930, fn. 164 p. 1000 (1945).

[24] See, e.g., Lefler, *Jurisdiction To Grant Divorces*, 7 Miss. L. J. 445 (1935); McClintock, *Fault As An Element Of Divorce Jurisdiction*, 37 Yale L. J. 564 (1928); note 25 N. C. L. Rev. 192 (1947).

[25] *Williams* v. *North Carolina*, 317 U. S. 287, 297 (1942).

[26] For example, although this Court upheld the validity of a state statute which did not require that notice be given the creditor of a garnishee (*B. & O. R. R.* v. *Hostetter*, 240 U. S. 620 (1916)), it had earlier decided that the garnishee has a duty to give his creditor an opportunity to defend and that his failure in this respect would preclude his relying on the judgment of garnishment as a defense should his creditor sue him (*Harris* v. *Balk*, 198 U. S. 215 (1905)).

In the final analysis the situation presented here is no different in principle from that presented in *Wuchter* v. *Pizzutti,* 276 U. S. 13 (1928), where a similar substituted service device, adopted from not dissimilar motives of public policy, was invalidated by this Court under the due process clause. In that case, although this Court had previously approved substituted service upon non-resident motorists by enforced service upon a designated state official coupled with registered mailing to the non-resident defendant (*Hess* v. *Pawloski,* 274 U. S. 352 (1926)), it struck down a statute which provided only for the enforced service upon a state official and which did not include any provisions for mailing.[27] The court stated that:

> "Every statute of this kind . . . should require the plaintiff bringing the suit to show in the summons to be served the post office address of the defendant being sued, and should impose on the plaintiff himself or upon the official receiving service or some other, the duty of communication by mail or otherwise with the defendant". (276 U. S. at 20).

And the Court concluded that the cases sustained

> ". . . the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice. . ." (276 U. S. at 24).

Thus, not even the compelling local interest in assuring that non-resident motorist enjoying the hospitality of a state will answer for injuries done citizens of the state (see *Hess* v. *Pawloski,* 274 U. S. at 356), will—said this Court—

[27] The Court pointed out (276 U. S. at 20-21) that those cases upholding statutes permitting service upon corporations solely by substituted service upon a state official are not apposite to suits against individuals, because corporations assume this requirement as a condition of doing business in a state and their knowledge of the statute may prompt frequent inquiry as to suits against them. The distinction is equally applicable to the present case.

permit effectuation of this local policy in such a form as would deprive citizens of other states of an opportunity to be heard.[28]

So too in the instant case. While it may be conceded, that each state has a vital interest in the status of its citizens and in applying to them its local public policy in the field of domestic relations,[29] nevertheless that interest should not be permitted to be served in a form equally affecting the rights and status of citizens of other states without notice and an opportunity to be heard. The District of Columbia may not have a superior interest in the status of the parties to that of Louisiana (cf. *Williams* v. *United States,* 317 U. S. at 296), but certainly it has at least an equal interest which should be sub-served by a vigorous regard for constitutional procedures. Accordingly, the Louisiana procedure, which ignores the paramount federal policy insuring a reasonable opportunity to be heard should not stand.

CONCLUSION.

The judgment of divorce secured against petitioner, which the Supreme Court of Louisiana refused to vacate, was effected by a denial of the federally assured fundamentals of due process of law with respect to the form and nature of the substituted service prescribed by Louisiana statute but condemned by decisions of this Court. The practice contemplated by the Louisiana statute is conducive to an unrestrained and fraudulent exploitation of the ex

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[28] The Court held that even though there was evidence that the defendant had received actual notice of the pendency of the suit, this could not cure the deficiencies in the statutory requirements. 276 U. S. at 24. Thus, in the instant case, even assuming there was evidence—which there is not—that petitioner received the purported letter of February 28, 1944, this would not sustain the judgment of divorce.

[29] See *Williams* v. *United States,* 317 U. S. at 298-299.

parte divorce. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 578

EFFIE EMERSON WALSH, Petitioner,

v.

BERNARD A. WALSH

BRIEF IN OPPOSITION TO APPLICATION OF PETITIONER FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

The respondent, Roovie House Walsh, opposes the application of petitioner for a *writ of certiorari* for the reason that no federal questions are involved and for the further reason that the federal questions allegedly involved have not been presented to any of the Courts below.

STATEMENT

Because of the alleged inability of the petitioner to advance the costs for printing the record we have waived this requirement and therefore are forced to file

this brief without the benefit of the record in the case other than the transcript filed in the Supreme Court of Louisiana.

On page 2 of the petition for the writ, jurisdiction is invoked under Section 1257 (3) of the *Judicial Code, 28 U.S.C. 1257 (3).*

On the same page are stated the three questions presented to this Court. Only the first of these, as we see it, involves any federal question.

A reading of the "Conclusion" on page 18 of the present petition shows that the only federal question relied upon is whether or not the Act of Louisiana providing for substituted service is constitutional within the requirements of *Section 1 of the 14th Amendment to the Constitution of the United States.*

ISSUES IN STATE COURT

Effie Emerson Walsh claiming to be a resident of Washington, D. C. appeared in Suit No. 14798 on the Docket of the Twenty Sixth Judicial District Court, Bossier Parish, Louisiana in proceedings entitled Bernard A. Walsh v. Effie Emerson Walsh and by making all interested parties defendants [1] attempted to annul a judgment of divorce entered in favor of Bernard A. Walsh,

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1/ She there invoked the same substituted service, to-wit: the appointment of a **curator ad hoc**, which she here attempts to attack, **R-45.**

then deceased, against her, alleging as grounds therefor:

1. That the Court was without *jurisdiction ratione materiae*, because the plaintiff Bernard A. Walsh was not a resident of Bossier Parish, Louisiana, and

2. That there had been no living separate and apart as required by Act 430 of 1938 of the Legislature of Louisiana, and that therefore the divorce had been granted upon fraudulent and untrue allegations and evidence. [2]

These issues were decided in favor of plaintiff by the trial court (R-183), but the decision of the trial court was reversed and the contentions were decided adversely to the petitioner by the Supreme Court of Louisiana. [3]

The petitioner raised no federal question in the trial court and as will appear by the opinion of the Supreme Court of Louisiana none was presented to it nor passed upon by it. [4]

2/ See Page 40 of the record in the Supreme Court of the State of Louisiana.

3/ **Walsh v. Walsh, 42 So. (2) 860 (1949)**

4/ In the application for rehearing in the Supreme Court of Louisiana the petitioner purported to invoke the 14th Amendment to the Constitution of the United States. In paragraph 6 of the application the equal protection clause of this Amendment is referred to in a manner not only ambiguous but having no apparent relation to any constitutional arguments now relied upon. In paragraph 7 the due process clause is referred to but on an entirely different ground from that invoked before this Court.

ARGUMENT

We consider it too well settled law, supported by decisions more numerous than we care to mention, as well as by the Rules of this Court that writs of *certiorari* will not be granted by this Court when the federal question has not been timely raised in the trial court and certainly not when it has not been raised in either the trial court or the appellate court except in an illusory manner in an application for rehearing in the Supreme Court of the State. [5]

Rule 38 of the Supreme Court of the United States Section 5, states that the writ is not a matter of right and can only be granted when special and important reasons therefor exist Under Subsection (a) thereof it is stated that a federal question of substance must have been decided by the state court.

Rule 12, Section 1, states that in the jurisdictional statement there shall be contained a statement of the grounds upon which it is contended that the questions involved are substantial. Nothing to this effect appears in the present petition.

5/ To strike with nullity the procedure used in this case would be to overturn the procedure used in the courts of Louisiana for over a century and a half. The title to millions of dollars worth of property and the stati of untold persons would be affected. Certainly the courts of the State of Louisiana should first be given an opportunity to pass upon the validity of this process, condemned by Counsel for petitioner as "conducive to an unrestrained and fraudulent exploitation of the **ex parte divorce**", but never before so condemned by any other person or tribunal.

The same rule also provides that the jurisdictional statement shall specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them********** ; and the way in which they were passed upon by the Court. All of this is missing from the present petition. The reason is apparent. Petitioner who herself brought the action in nullity, could and should have attacked the statute or raised her constitutional objections in the trial court and could and should have given the state courts an opportunity to pass upon these consitiutional questions but failed and refused to do so. [6]

The only question presented by the petitioner in the trial court and in the Supreme Court of Louisiana were questions of fact, namely the residence, *vel non.* in Louisiana of Bernard A. Walsh and the sufficiency of the evidence adduced in the divorce proceedings.

Will it not suffice to cite just several decisions of this Court to the effect that federal questions not raised in the courts below cannot be reviewed by the United States Supreme Court. [7]

6/ Vide note 1.

7/ See **Selover, Bates & Co. v. Walsh**, 33 S. Ct. 69, 226 U.S. 112, 57 L. Ed. 146 (1912); **Dill v. Ebey**, 33 S. Ct. 620, 229 U.S. 190, 57 L. Ed. 1148 (1913); **Southern Pacific Co. v. State of Louisiana**, 39 S. Ct. 313, 249 U.S. 472, 63 L. Ed. 713 (1919); **Appelby v. Buffalo**, 31 S. Ct. 699, 221 U.S. 524, 55 L. Ed. 838 (1911).

The record of the Court below must show that the constitutional question was presented and passed upon. [8]

Even if it be considered that the ambiguous references to the *14th Amendment to the Constitution of the United States* contained in the application for rehearing in the Supreme Court of Louisiana [9] could be considered as the raising of a federal question, decisions of this Court too numerous to mention state that the writ will not be granted where the question was presented for the first time in an application for rehearing and particularly *where no utterance of the state court could be deemed to have passed upon or raised any federal question.* [10]

In *Pim v. City of St. Louis* [11] from which we quote, this Court held:

> "Upon inspecting the record we find that no federal right was set up or claimed, in any form, until after the final decision of the case by the Supreme Court of Missouri, and then by a petition for rehearing. That petition was overruled by that court without any determination of the alleged federal question, indeed without any allusion to it. The

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8/ **Baily v. Anderson, 66 S. Ct. 66, 326 U.S. 203, 90 L. Ed. 3 (1945).**

9/ See note 4.

10/ **Radio Station W.O.W. v. Johnson, 65 S. Ct. 1475, 326 U.S. 120, 89 L. Ed. 2092 (1945); Worthy v. Commissioner, 76 U.S. 611, 9 Wall 611, 19 L. Ed. 965 (1869); Scudder v. Coler, 20 S. Ct. 26, 175 U.S. 32, 44 L. Ed. 62 (1899); Bonner v. Gorman, 29 S. Ct. 483, 213 U.S. 86, 53 L. Ed. 709 (1909); Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 40 S. Ct. 330, 252 U.S. 341, 64 L. Ed. 601 (1920).**

11/ **17 S. Ct. 322, 165 U.S. 273, 41 L. Ed. 714 (1897).**

claim of a federal right came too late, so far as the revisory power of this court is concerned. Loeber v. Schroeder, 149 U.S. 580, 585 (37: 856, 860); Sayward v. Denny, 158 U.S. 180, 183 (39: 941, 942)."

CONCLUSION

We submit that by the Judicial Code, the Rules of this Court and the uninterrupted jurisprudence of this Court, it is without jurisdiction to entertain the petition for a writ of certiorari allegedly presenting federal questions never before urged.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

No. 578.

EFFIE EMERSON WALSH, *Petitioner*

v.

BERNARD W. WALSH, *Respondent*

On Petition For a Writ of Certiorari to the Supreme Court of Louisiana.

REPLY BRIEF.

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IN THE

Supreme Court of the United States

No. 578.

EFFIE EMERSON WALSH, *Petitioner*

v.

BERNARD W. WALSH, *Respondent*

On Petition For a Writ of Certiorari to the Supreme Court of Louisiana.

REPLY BRIEF.

In opposition to the petition for a writ of certiorari, advancing substantial reasons for the review of the Louisiana procedure whereunder petitioner was not given notice of or opportunity to be heard in divorce proceedings instituted by her husband, respondent has merely answered that the issue of notice and lack of due process was not properly raised below and that, therefore, it cannot be considered here.

From an analysis of the record, petition, and supporting brief, it is patent that respondent's failure to argue to the merits of the issues presented by the petition is traceable

to an inability to muster any logical support for such a manifestly unconstitutional and unfair ex parte procedure as that provided by Louisiana law.

Petitioner denies that the issues presented in the petition were not raised below, although petitioner concedes that the points might have been more pointedly presented. As shown in the petition, the issue of lack of notice to petitioner of the pendency of divorce proceedings was raised by petitioner's original pleadings in the Bossier Parrish court to vacate and set aside the divorce decree (Pet. 5). But since the trial court disposed of the case favorably to the petitioner by vacating the divorce decree on other grounds raised in the petition, it was unnecessary for petitioner to raise or argue the question of adequate and proper notice in the Supreme Court of Louisiana because the case came to that court in a posture dealing only with the specific grounds upon which it had been disposed of by the trial court in favor of the petitioner. It was not, therefore, until the Supreme Court of Louisiana had reversed the trial court and ordered the divorce decree reinstated that it became necessary again to raise the question of notice and lack of due process, which was immediately done by petitioner in a timely petition for rehearing (See Pet. 7). In similar circumstances, this Court has taken jurisdiction to decide the federal question involved even though the state court did not specifically pass on the point by granting the petition for rehearing and then ruling on the issues thus raised. See *Missouri ex rel Missouri Insurance Co.* v. *Gehner,* 281 U. S. 311, 320 (1930). See also *Wuchter* v. *Pizzuti* 276 U. S. 13 (1928).

This Court early stated that jurisdiction will be taken to decide a federal question appearing and disposed of in the state court proceedings by express averment or by *necessary intendment. Steines* v. *Franklin County,* 14 Wall 15, 20-21 (1872). It is quite obvious in this cause that the due process question with respect to notice was by necessary intendment disposed of against petitioner by the action of

the Supreme Court of Louisiana. As petitioner pointed out in her argument in support of the petition (Pet. 11-12), the Supreme Court of Louisiana had already held, in 1919, that the Louisiana statute was constitutional. Having already decided this question adversely to the position of petitioner, that court would not have been disposed to hold otherwise in this case. This earlier disposition of the constitutional issue, combined with what respondent suggests (Brief in Opp., page 4, fn. 5) is over a century and a half of Louisiana procedure assuming the validity of the statute in question, must necessarily be implicitly read into the action of the Supreme Court of Louisiana in denying the petition for rehearing. And such denial, therefore, must be construed as an implicit affirmation and incorporation of that court's previous constitutional determination in 1919. Thus, the normal reasons for the rule precluding review by this Court of constitutional issues upon which the highest court of the state has not been given timely opportunity to pass do not apply because in this case the highest court of the state previously had such opportunity and exercised it adversely to the position advanced by petitioner.

Finally, it should be noted that respondent completely ignores the second point raised in the petition, wherein petitioner urges that she was denied due process by the determination of the Supreme Court of Louisiana that it was her burden, in proceedings to vacate a default judgment of divorce, to show that the divorce court had originally lacked jurisdiction because of the husband's nonresidence. That question never arose in the trial court, and prior to the opinion of the Supreme Court of Louisiana stating that petitioner had such a burden of proof, petitioner had no intimation that the resolution of the cause might turn upon such a legal conclusion. In these circumstances, petitioner should not be foreclosed from raising the issue in this Court. See, *Missouri ex rel, Missouri Insurance Co.* v. *Gehner, supra.*

In conclusion, petitioner respectfully reiterates, as previously urged in her petition, that the Louisiana procedure pursuant to which a divorce was secured by her husband tolerated such a flagrant disregard of her basic right to notice and an opportunity to be heard that the intervention of this Court is appropriate to remedy this grave injustice.

For the foregoing reasons and the reasons advanced in her petition and supporting argument, petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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